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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-9191

JOE ROSATO, WILLIAM K. PATTERSON, GEORGE F. GRUNER AND JIM BORT, *Petitioners*

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO, *Respondent*

Petition for a Writ of Certiorari to the Court of Appeal of the State of California for the Fifth Appellate District

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS FOR LEAVE TO FILE JOINT BRIEF AMICUS CURIAE AND JOINT BRIEF AMICUS CURIAE

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MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS FOR LEAVE TO FILE JOINT BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") and the American Society of Newspaper Editors (hereinafter "ASNE") respectfully move this Court for leave to file the accompanying Joint Brief Amicus Curiae in support of the Peti-

tion for Writ of Certiorari filed herein. Although the attorneys for Petitioners have consented to the *amici's* filing of a joint brief amicus curiae, the *amici* have been advised that the Respondent will not grant its consent.

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,140 newspapers representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Fresno Bee, which employs the petitioners, and sixty other daily newspapers published throughout the state of California hold membership in the ANPA. Concerned with matters of general significance to the profession of journalism and the daily newspaper publishing business, the ANPA seeks to keep its members abreast of matters touching on these concerns. In that regard, the Association's member newspapers, individually and through the ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, preamble), and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

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The ANPA, ASNE and their members are vitally interested in protecting and maintaining the primary function of newspapers: the gathering of information for dissemination to the people. To ensure the free and uncensored flow of information to the public, those engaged in news gathering and reporting must be privileged to hold confidential their sources of information. In *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), this Court held that the First Amendment did not provide an absolute privilege to newsmen which would permit them to refuse to appear or testify before a grand jury. The holding in that case, however, was a narrow one and did not negate the existence of a qualified privilege which would protect a newsman and his sources in contexts other than grand jury proceedings.

Despite the limited nature of the *Branzburg* decision, several state and federal courts have accorded it an overly-expansive interpretation in denying reporter's assertions of privilege in non-grand jury proceedings. In the case sought to be presented to this Court by Petitioners, the Court of Appeal of the State of California for the Fifth Appellate District, in its majority opinion, erroneously concluded that *Branzburg* "verified that a newsperson would have the same duty to appear at trial pursuant to a subpoena and give what information he possesses." Other cases have similarly extended the narrow holding of *Branzburg* and threaten to completely erode the qualified First Amendment privilege which this Court there recognized. *See, Farr* v. *Pitchess,* 522 F.2d 464 (9th Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3162 (U.S. Sept. 22, 1975) (No. 75-444); *Carey* v. *Hume,* 492 F.2d 631 (D.C. Cir. 1974), *petition for cert. dismissed,* 417 U.S. 938 (1974); *United States* v. *Liddy,* 354 F.Supp. 208 (D.D.C. 1972),

motion for stay pending appeal denied, 478 F.2d 586 (D.C. Cir. 1972).

The contempt judgments against petitioners, upheld by the California court below, constitute a serious intrusion upon the qualified privilege which protects a newsman's sources, and the California appellate court's decision demonstrates the misunderstanding which exists as to the very limited scope of the *Branzburg* ruling. That misunderstanding, and decisions resulting from it, will hamper reporters in developing and preserving their sources and thereby frustrate the function of an autonomous and independent press. Only a further decision from this Court, delineating more fully the applicability of the qualified privilege, can eliminate the interference with the free flow of information caused by actual and threatened contempt citations of members of the press.

Because of the importance of the issues sought to be presented to this Court by the Petition for a Writ of Certiorari, the ANPA and ASNE desire to present to this Court, for its assistance, their views in regard to the important issues involved in this proceeding.

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WHEREFORE, the American Newspaper Publishers Association and the American Society of Newspaper Editors respectfully request this Court to grant this motion and permit them to file the Joint Brief Amicus Curiae attached hereto and submitted herewith.

Respectfully submitted,

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JOINT BRIEF OF AMICI CURIAE, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND AMERICAN SOCIETY OF NEWSPAPER EDITORS

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") and the American Society of Newspaper Editors (hereinafter "ASNE") submit this joint brief amicus curiae in support of Petitioners', Joe Rosato, William K. Patterson, George F. Gruner and Jim Bort, Petition for a Writ of Certiorari.

INTEREST OF THE AMICI CURIAE

As set forth in their motion for leave to file this brief, and as restated herein, the ANPA, ASNE and their members have a significant concern for insuring that the First Amendment's guarantee of a free press shall not be abridged.

The American Newspaper Publishers Association is a nonprofit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,140 newspapers representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Fresno Bee, which employs the petitioners, and sixty other daily newspapers published throughout the state of California hold membership in the ANPA. Concerned with matters of general significance to the profession of journalism and the daily newspaper publishing business, the ANPA seeks to keep its members abreast of matters touching on these concerns. In that regard, the Association's member newspapers, individually and through the ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, preamble), and the ongoing responsibility to improve the manner in which the journalism profession carries out

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its responsibilities in providing an unfettered and effective press in the service of the American people.

The ANPA, ASNE and their members are vitally interested in protecting and maintaining the primary function of newspapers: the gathering of information for dissemination to the people. To ensure the free and uncensored flow of information to the public, those engaged in news gathering and reporting must be privileged to hold confidential their sources of information. In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), this Court held that the First Amendment did not provide an absolute privilege to newsmen which would permit them to appear or testify before a grand jury. The holding in that case, however, was a narrow one and did not negate the existence of a qualified privilege which would protect a newsman and his sources in contexts other than grand jury proceedings.

The contempt judgments entered by the respondent court, and affirmed by the California appellate court, represent a serious breach of the limits provided by the First Amendment to prevent the government from interfering with the right to gather and disseminate information guaranteed by that Amendment. Because of the importance of this issue as it relates to the questions sought to be placed before this Court by the Petition for a Writ of Certiorari, ANPA and ASNE desire to present to this Court, for its assistance, their views in regard to the important issues involved in this proceeding.

ARGUMENT

At the outset it must be pointed out that ANPA and ASNE strongly support and adopt the position of the

Petitioners herein. We believe that their brief persuasively and accurately indicates the constitutional infirmity of the truncated due process rights accorded to the Petitioners in the judge-initiated investigative hearing conducted before the Respondent Court. Further, the Petitioners have clearly presented the confused state of the law with regard to those standards which must be applied by trial courts when faced with the "Free Press-Fair Trial" dichotomy.

With reference to the latter issue, your *amici* believe that the standard applied by the majority of the California appellate court was an improper one. That court stated that "the judge need only be satisfied that there is a *reasonable likelihood* of prejudicial news which would . . . tend to prevent a fair trial." 124 Cal. Rptr. at 438-439 (Emphasis supplied). As this Court has recently held, the mere fact that news stories, even prejudicial news stories, are published concerning a defendant is not sufficient by itself to lead to the presumption that a defendant has been deprived of due process. *Murphy* v. *Florida,* —— U.S. ——, 44 L.Ed 2d 589 (1975). That being the law, a trial judge must exercise extreme care in deciding whether or not to issue a "gag order." In making that decision, the judge should first determine whether the potential for prejudicial news coverage poses a "serious and imminent threat to the administration of justice." Even if the judge does so determine, his guidelines for the release or non-release of information must not suffer from vagueness or overbreadth. *See, Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242 (7th Cir. 1975); *CBS, Inc.* v. *Young,* 522 F.2d 234 (6th Cir. 1975). As the Petitioners have indicated, the Respondent Court failed to

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apply the appropriate standard in issuing the orders which led to the contempt judgments at issue.

Your *amici* wish to emphasize the radical departure from *Branzburg* which the decision below represents and the serious infringement of First Amendment rights and privileges which will result if that decision is allowed to stand.

The Decision in Branzburg Provides No Support for the Entry of the Contempt Judgments Below

In *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), for the first time, this Court considered the issue of whether the First Amendment protects newsmen in refusing to reveal a confidential news source or information received from such a confidential source. The resulting opinion of this Court held only that a newsman could be required to appear and testify before a grand jury when the newsman had knowledge of possible criminal conduct which was the subject of the grand jury's inquiry. In so holding, the Court left open the question as to when a newsman's assertion of privilege would be upheld in non-grand jury proceedings, either criminal or civil. The Court repeatedly emphasized that its decision in *Branzburg* was based on the unique function of the grand jury in our society and on the fact that it was information in regard to *criminal* conduct which was being sought. "Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas." 408 U.S. at 691. Moreover, the Court stated that there were limits beyond which even a grand jury could not go in seeking information from newsmen. 408 U.S. at 707-08.

As Justice Powell stated in his concurring opinion:

> "If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."

408 U.S. at 710.

Bearing in mind that *Branzburg* permitted an exception to the newsman's First Amendment privilege primarily because of the overriding interest of the public in acquiring information relating to criminal conduct, it is clear that the court below was in error when it applied the *Branzburg* exception to the petitioners' assertions of privilege. The California appellate court specifically held that the investigative hearings conducted by the Respondent Court had nothing to do with the investigation of possible criminal conduct: "[P]roceedings to investigate violations of court orders instigated by the court itself are not prosecutions of crimes . . ." 124 Cal. Rptr. at 441. "The suggestion of criminal activity was incidental to the accomplishment of the principal objective, and manifestly, an investigation of potential crimes was not the purpose of the investigation . . ." 124 Cal. Rptr. at 451.

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Your *amici* do not contend that the Respondent Court lacked authority to conduct the investigative hearings. Since, however, the hearings did not (and, evidently, could not) involve an inquiry into criminal conduct, your *amici* would assert that the *Branzburg* exception was not applicable. There was no public or judicial interest involved which was so substantial as to allow the burden on news gathering and infringement of First Amendment privilege which was imposed by the threat, and eventual fact, of the petitioners' being held in contempt for refusing to answer certain questions directed to them at the investigative hearing.

It is contended that the Respondent Court had a duty to investigate the possible violations of its orders and that in such an investigation the court had the power and authority to utilize its contempt powers to punish newsmen who refused to divulge information concerning the possible violations. Again, your *amici* do not contest the power or duty of the court to conduct such investigations. We do contend, however, that the power of the court to question newsmen in such a proceeding is limited, and that, in the instant case, the Respondent Court exceeded those limitations.

In a Non-Grand Jury Investigation a Newsman's First Amendment Privilege Limits the Scope of Inquiry of the Investigative Body

Two sources for limitations on the scope of inquiry were presented to the court below: a newsman's First Amendment privilege to refuse to disclose sources of confidential information and the California "shield law," California Evidence Code, section 1070. The appellate court held that, in the context of court-instigated investigative hearings such as those conducted

below, the California shield law did not bar the court from asking questions of the newsmen if the answers might reveal that the source of information was an individual directly subject to the trial court's order. It was held, however, that: "The shield law still remains as a protection against the revelation of all sources other than court officers, and a reporter cannot be required to divulge information which would tend to reveal any source other than those court officers subject to the orders issued by the court." 124 Cal. Rptr. at 450.

In regard to the First Amendment privilege the appellate court held that the petitioners were entitled to *no* privilege or protection, basing this holding on the "conclusion that the right to a fair trial outweighed the conditional First Amendment right to refuse to disclose sources" 124 Cal. Rptr. at 443. Although the appellate court recognized that a balancing test was required whenever First Amendment privilege and another constitutional guarantee came into conflict, the court's articulation and application of the balancing test were woefully lacking. Essentially, the court held that, no matter how ephemeral might be the need for protection, a criminal defendant's right to a fair trial will always take "preeminent importance" over the newsman's First Amendment privilege. This approach completely ignores the limited nature of the infringement of privilege sanctioned in *Branzburg*; no inquiry into the essentiality or materiality of the information in the newsman's possession would be required. *See, Brown* v. *Commonwealth,* 204 S.E. 2d 429, 431 (Va.), *cert. denied,* 419 U.S. 966 (1974).

Although in *Branzburg* this Court was unwilling to lay down specific rules concerning "preliminary show-

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ings and compelling need" which might be required to allow infringement of a newsman's First Amendment privilege, the Court did indicate that limitations existed, even with regard to grand juries, on the ability and power of investigative bodies to force newsmen to testify. 408 U.S. at 699-700 and 708-09. Such limitations would apply both at the initial stages of any investigative proceeding and at any later point in the proceedings when it appeared that the investigative body was attempting to exceed the boundaries of *Branzburg*. In the case sought to be presented by the Petition for a Writ of Certiorari, the respondent court clearly exceeded those boundaries.

The petitioners herein did answer all questions which sought to discover whether or not the individuals directly subject to the respondent court's gag order had supplied petitioners with a copy of the grand jury transcript or the information contained therein. 124 Cal. Rptr. at 435. Therefore, this Court need not determine the applicability of the newsman's First Amendment privilege when a reporter refuses to reveal the identity of an individual who has violated a court order to which the individual was subject. Assuming that the investigative proceeding initiated by the respondent court was appropriate and that it was permissible to require reporters to answer certain questions in such a proceeding, the issue presented for this Court's consideration relates to the point at which the limits of the First Amendment will foreclose further inquiry. Your *amici* believe that the respondent court exceeded those limits.

Once the respondent court had received assurances, both from the "court officers" and from petitioners,

that no "court officer" had been the source of the information published, the court's power to make further inquiry of petitioners was at an end. The power to investigate enforced by the contempt power may be a necessary component of a court's authority and power to enforce "gag orders" which it issues; however, once it is clear that no one directly subject to such an order has violated the order, the necessity for the power ceases. It must cease when further use of the power would infringe First Amendment rights and privileges, since there no longer exists the "adequate foundation for inquiry" or the "existing need" for disclosure which might allow infringement of the First Amendment interests at stake. *See, Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539 (1963); *DeGregory* v. *New Hampshire Attorney General,* 383 U.S. 825 (1966).

In *DeGregory, supra,* Mr. DeGregory appeared in investigative proceedings being conducted by the New Hampshire Attorney General. Those proceedings had been initiated for the purpose of discovering whether or not subversive activities were then being engaged in within the state. Mr. DeGregory was willing to answer questions concerning his relationship with and knowledge of Communist activities since 1957 (the hearings were conducted in 1963), and in fact he did answer the questions. He refused, however, to answer questions concerning earlier periods and was therefore found in contempt and committed to jail. On his appeal to this Court, the judgment was reversed. This Court held that there had been no showing of a present danger of sedition against the state of New Hampshire itself, and, therefore New Hampshire's interest was "too remote and conjectural to override the guarantee of the First

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Amendment that a person can speak or not, as he chooses, free of all governmental compulsion." 383 U.S. at 830. *See also, Watkins* v. *United States,* 354 U.S. 178 (1957); *United States* v. *Rumely,* 345 U.S. 41 (1953).

By answering the initial questions propounded to him, DeGregory indicated that he had no knowledge of present Communist activities in New Hampshire. Thereafter, he could not be forced to answer any other questions not directly related to the scope of the attorney general's inquiry; *i. e.,* current subversive activity in the state. Similarly, the petitioners herein answered all of the initial questions which sought to discover whether one of the "court officers" had been the source for the information published. As in *DeGregory,* all other questions asked of petitioners went beyond the scope of the respondent court's inquiry; *i. e.,* whether a "court officer" had violated the "gag order." Utilization of the contempt power to force petitioners to answer those additional questions clearly infringed the newsman's First Amendment privilege and exceeded the limitations on inquiry which that privilege and the *Branzburg* decision impose.

It is respectfully submitted that the contempt judgments entered by the respondent court present to this Court serious violations of the constitutional guarantee of a free press. Moreover, the California appellate court's opinion, affirming fifty-five of those judgments, demonstrates a crucial misreading and misunderstanding of the narrow scope of the decision rendered in *Branzburg* v. *Hayes.* If the courts of this land are allowed to continue in the mistaken belief that *Branzburg* sanctions the forced disclosure of sources and

information by newsmen in any and every investigative proceeding, the ability and the right of the press to engage in news-gathering and dissemination of information to the public, as contemplated by the First Amendment, will be destroyed.

CONCLUSION

It is respectfully urged that this Court grant the petition for writ of certiorari in order that the substantial constitutional questions raised therein can be fully examined.

Respectfully submitted,

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